IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.1229/2001

Reserved on. 27.4.2007

Decided on.1.6.2007

Madan Lal Azad **…Petitioner.**

Versus

State of H.P. & another **…Respondents**

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?[1]*. No.*

For the petitioner : **Mr. Rahul Mahajan, Advocate**

For the respondent No.1 **Mr. M.S. Chandel, Advocate General with Mr. M.A. Khan and Ms. Meenakashi Sharma, Deputy Advocates General.**

For the respondent No.2 **Mr. Sandeep Kaushik, Advocate.**

Rajiv Sharma, J.

This petition is directed against the judgment dated 20.10.1991 passed by learned District Judge, Chamba, District Chamba, H.P.

The brief facts necessary for the adjudication of this petition are that the written complaint/report from the Sanitary Inspector was received by the respondent No.2 on 24.4.2001 and 9.5.2001 to the effect that the petitioner was raising unauthorized construction of RCC pillars and retaining wall along with cutting of slope area in Lovelace Estate, N.T. Mall, Dalhousie without the requisite permission. A notice dated 28.4.2001 under section 211 (1) (a) of the H.P. Municipal Act, 1994 was served upon the petitioner asking him to remove the unauthorized construction within 15 days. The Junior Engineer of the respondent No.2-

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgment***? No

Council submitted his report on 21.5.2001 to the Council by stating therein that the petitioner has not stopped unauthorized construction. The Junior Engineer and Sanitary Inspector visited the spot on 24.5.2001 and found that the petitioner was raising unauthorized construction. They seized the tools being used for the construction on the spot. The Junior Engineer again submitted report to the Council on 31.5.2001 bringing to its notice that the petitioner had raised RCC slab without getting permission from the competent authority. The Executive Officer of the respondent No.-2-council issued a notice to the petitioner under section 211 of the Municipal Act, 1994 informing the petitioner that he was putting up a slab of second storey measuring 6.85 mtr. X 21.6 mtrs in Mehra Estate N.T. Mall, Dalhousie without prior permission. The Junior Engineer and Sanitary Inspector again submitted a report to the Council on 8.6.2001 brining to its notice that the petitioner was still raising the construction and had covered the whole area and was raising RCC slab on the existing building and consequently he was served with a notice to stop the unauthorized construction. The Executive Officer served a fresh notice dated 14th June 2001 under section 211 (C) of the Municipal Act, 1994 in continuation of earlier notice dated 26.5.2001 upon the petitioner that he was violating section 203 of the H.P. Municipal Act, 1994 and he was called upon to show cause within twenty four hours from the date of receipt of notice as to why a fine of Rs. 1000/- and further for non compliance and for continuing the construction work Rs. 50/- per day be not imposed upon him. The petitioner addressed a letter to the Executive Officer of the Council on 21.6.2001 stating therein that he had purchased the land/plot measuring 500 mtrs from Mr. Ajay Kumar Mehra along with approved site plan of the said land and had submitted the application in the office of

Municipal Council, Dalhousie on 29.5.2001 for raising a Dunga for protecting the building and parking has been constructed over the wall.

The matter thereafter was placed in the meeting of the Council held on 27.6.2001 and vide resolution No. 179 (1) it was unanimously resolved that the unauthorized constriction be demolished in accordance with law. The notice issued to the petitioner in pursuance to the resolution dated 27.6.2001 is available as Annexure P-1 of the paper book of this petition. The petitioner feeling aggrieved by the issuance of notice dated 13th July, 2001 approached the learned District Judge by way of an appeal under section 212 (1) of the Municipal Act, 1994. The learned District Judge has dismissed the appeal on 20.10.2001.

Mr. Rahul Mahajan, Advocate appearing on behalf of the petitioner has strenuously argued that the judgment dated 20.10.2001 of the learned District Judge, Chamba is not sustainable in the eyes of law. Mr. Rahul, has submitted the action initiated by the respondent No.2-Council, which has culminated into issuance of show cause notice dated 13th July, 2001 and affirmed by the Learned District Judge in its judgment dated 20.10.2001 are in violation of principles of natural justice. He has further submitted that the various notices mentioned in the order dated 13th July, 2001 and the notices mentioned in the judgment of the learned District Judge were never served upon the petitioner.

Mr. Sandeep Kaushik, Advocate appearing on behalf of respondent No.2 has supported the judgment dated 20.10.2001. He has drawn the attention of this Court to para 4 of the reply and on that basis submitted that the notice No. 736-DMC dated 28.4.2001 was delivered to the petitioner on 28.4.2001 (Copy Annexure R-2/1). The notice No. 865/DMC dated 26.5.2001 as Annexure R-2/3 and Annexure R-2/5 notice No. 1010/DMC dated 14.6.2001 were delivered to the petitioner as per

Annexure R-2/4 and R-2/6. Mr. Kaushik has further argued that order No. 1277 to 80/DMC dated 13.7.2001 was delivered to the petitioner on 13.7.2001 itself. It was in these circumstances that when the petitioner did not stop the construction work despite the issuance of notices copies of which were duly received by the petitioner, the ex-parte order was passed against him. Mr. Kaushik has vehemently denied the argument of Mr. Mahajan that no unauthorized construction was raised by the petitioner on the spot.

I have heard the parties and perused the record.

The learned District Judge after considering the relevant provisions of the H.P. Municipal Act, 1994 extensively has come to a just conclusion that the construction raised by the petitioner was unauthorized. Mr. Rahul Mahajan has also submitted that the petitioner has been discriminated by the Municipal Council though the cases of persons whose names have been given in para 8 of the petition have been compounded. The respondent No.2-council has specifically dealt with this issue in its reply and about the action which was taken against the persons whose names find mention in para 8 of the petition. It is evident from the reply that in majority of the cases the deviation was less than 10% or only minor repairs were carried out and in the case of one Mahinder Vir Singh, the same was compounded by the State of H.P. itself by imposing a fine of Rs. 40,000/- as compensation fee.

The learned District Judge has examined the record and the findings recorded by him will not be interfered with by this Court while exercising the jurisdiction under Article 226/227 of the Constitution of India.

The Hon'ble Supreme Court in ***M.I. Builders Pvt. Ltd. V. Radhey Shyam Sahu*** (1999*) 6* SCC 464 has held that the Court should order

demolition of such construction even though builder has invested considerable amount. Their Lordships of the Hon'ble Supreme Court have opined as under:

> **"No consideration should be shown to the builder or any other person where construction is unauthorized. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorized construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles."**

The upshot of the above discussion is that there is no violation of the principles of natural justice as submitted by Mr. Rahul Mahajan, Advocate appearing on behalf of petitioner since the petitioner had received the notices issued by the respondent-Council from time to time and he had chosen not to file the replies to the same. It has come on record that the petitioner was repeatedly warned not to raise unauthorized construction but to no avail. On two occasions, the tools were also seized but that also did not deter the petitioner to raise the unauthorized construction. It was in these circumstances and on the basis of the report furnished by the Sanitary Inspection and Junior Engineer of the Council that the matter was placed before the House of the Municipal Council, who passed the resolution on 27.6.2001 which led to the issuance of notice dated 13th July, 2001. The council had already explained the position of

the action taken against the persons whose names have been mentioned in para 8 of the petition.

The petitioner had raised unauthorized construction without seeking prior permission of the Municipal Council as per the provisions of the H.P. Municipal Act, 1994 and the Building Bye-Laws framed there-under.

Accordingly this petition is dismissed with no order as to costs and the interim order 29.11.2001 is vacated.

(Rajiv Sharma), Judge

June 1, 2007
Awasthi